STATE OF MICHIGAN

IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY,
Deceased, by its Personal Representative,
DAYLE TRENTADUE,

Plaintiff-Appellee,

-vs-

MFO MANAGEMENT COMPANY,

Defendant-Appellant,

and

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAWRENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, deceased,

Defendants.

Supreme Court Nos. 128623, 128624, 128625

Court of Appeals Nos. 252155, 252209

Lower Court No. 02-074145-NZ

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

CERTIFICATE OF SERVICE

*** ORAL ARGUMENT REQUESTED ***

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

II DOES MICHIGAN'S ACCRUAL STATUTE, MCL 600.5827, APPLY TO THIS ACTION?

Plaintiff-Appellee says "No".

Defendant-Appellant says "Yes".

III. UNDER THIS COURT'S DECISIONS IN *BRYANT V OAKPOINTE VILLA NURSING CENTRE,* 471 MICH 411; 684 NW2D 864 (2004) AND *DEVILLERS V AUTO CLUB INS ASS'N*, 473 MICH 562; 702 NW2D 539 (2005), IS THIS AN APPROPRIATE CASE FOR THE EXERCISE OF A COURT'S EQUITABLE AUTHORITY AFFECTING A LIMITATIONS PERIOD?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

COUNTERSTATEMENT OF FACTS

1. The Parties

This case arises out of the notorious 1986 murder of Margarette Eby. Mrs. Eby was a well-known former provost for the University of Michigan-Flint, who left the college to run the classic music series "Basically Bach" and to do fund raising. (Apx. 32a). Mrs. Eby rented the gatehouse on the bucolic surroundings of the Mott Estate (known as "Applewood") in 1981 and lived there until she was found murdered on November 9, 1986. (*Id.*) Mrs. Eby's daughter, Dayle Trentadue (hereinafter "plaintiff"), brought this action on behalf of her mother's Estate in 2002, seven months after the discovery of those responsible for her mother's murder. *(Id).*

Before November 9, 1986, Ruth Mott was the heir to a billion-dollar fortune and lived a hermitic lifestyle at the Mott Estate. (Apx. 34a). Applewood and virtually all of her personal dealings were handled by her secretary or by the Mott Family Office ("MFO"). (Apx. 34-35a). A 'family office' is an organization staffed by financial advisors and other professionals to assist extreme high net-worth individuals who require daily attention to their investments and personal schedules. In this case, MFO, which was formed in 1969, was designed to attend to the financial and personal needs of Ruth Mott, her children, and her nieces and nephews. (Apx. 63a). MFO acted on behalf of Mrs. Mott for virtually every aspect of her business and personal affairs.

In 1986, Paul Yager was the Chief Executive Officer of MFO. (Apx. 56a). His duties to Mrs. Mott included dealing with a wide range of issues relating to employees for the estate, the maintenance of estate grounds, charitable foundations, and Mrs. Eby's tenancy at the gatehouse. (Apx. 1b).

Shirley and Laurence Gorton are the parents of Jeffrey Gorton. They operate a business

known as Buckler Automatic Sprinkler Co. and had been the contractors for the Mott Estate since at least 1981. (Apx. 33a). They employed their son, Jeffrey Gorton, sometime in early 1986 upon his release from a three and one-half year prison term in Florida for assault. (*Id*).

For Buckler to access the sprinkler system at the Mott Estate, its employees would be required to enter a locked common area beneath the gatehouse. (*Id).* On November 5, 1986, MFO agents or employees, Todd Bakos and Victor Nyberg, permitted Jeffrey Gorton unsupervised access to the common area. MFO took no action to determine if Jeffrey Gorton attempted to enter Mrs. Eby's premises or whether he created a means to re-enter the premises at a later time. (Apx. 36a). On November 7, 1986 Jeffrey Gorton re-entered the gatehouse through the common area and then gained access to the gatehouse where he laid in wait for Mrs. Eby. (Apx. 36a).

2. Margarette Eby's Murder

From 1981 through 1986, Mrs. Eby experienced occasional break-ins at the gatehouse and complained about them to Ruth Mott. Mrs. Mott never responded to Mrs. Eby; MFO did instead. (Apx. 56a). Letters written to Mrs. Mott in 1986 regarding break-ins at the gatehouse received the following response from Yager:

> While Mrs. Mott regrets the occurrence of last Wednesday night, it seems apparent that no system would have prevented your loss when the keys to make the system effective were left in your unlocked car in front of the house. Further, when you leave the gate open frequently and fail to provide visual security through drags, curtains or blinds, unnecessary temptation to unwelcome intruders is evident.
>
> *Id.*

Yager improperly placed the burden to secure the gatehouse on Mrs. Eby and away from the landlord. While Mrs. Eby took the obligation to ensure her own safety seriously, her vigilance was no match for a killer with both a key and unsupervised access to her home.

The night Mrs. Eby was murdered, November 7, 1986, she accompanied three friends to a dinner party. Following dinner, two of those friends drove Mrs. Eby home from the dinner party and arrived at the Mott estate sometime after 11:00 p.m. (Apx. 32a). The companions walked Mrs. Eby to her front door and observed her attempt to unlock her door with the use of her key. The lock would not function and Mrs. Eby muttered "this schizophrenic door" in frustration because of her inability to open the door. She asked her companions to walk her to the side door which was also locked. She opened the door with the use of her key, stepped inside and said good night. Her companions observed her lock the door before they departed. (Apx. 97a).

3. The Crime Scene Investigation: Police Fail To Find The Killer

Two days later, the door to the gatehouse was discovered unlocked and ajar. *Id.*, lines 20-21. All other doors in the home remained locked. (Apx. 97a-98a). Mrs. Eby's body was discovered in her upstairs bedroom. Nothing appeared to be missing from the home.

The physical evidence at the scene provided nothing of value. The first Flint PD officers to arrive at the gatehouse discovered what they described as perhaps the most gruesome murder scene they had ever seen. As a result of the expected onslaught of media scrutiny, police investigators immediately summoned Michigan State Police forensic scientists to recover whatever evidence was available at the scene. (Apx. 98a). The police found virtually nothing to link the crime to a particular individual except for a partial fingerprint on a bathroom faucet. In the face of what appeared to be a thorough effort on the part of the killer to cleanse the murder scene, police technology in 1986 could produce nothing of value to assist in the apprehension of Mrs. Eby's killer. (Apx. 99a).

Flint PD pursued the only theory that suited the murder scene: that the house was completely

locked shut until Mrs. Eby's killer, likely someone she knew, summoned her to the door, which Mrs. Eby voluntarily opened from the inside. Flint PD pursued each tip to make their "she knew the killer" theory work, but could never make a claim against anyone within Mrs. Eby's circle of friends or co-workers. (Apx. 73a). Based on the available evidence, Flint PD never even considered that a complete stranger may have been Mrs. Eby's killer or that MFO and the Gortons had contributed in any way to Mrs. Eby's death. *Id.*

David King, Flint PD's homicide detective, acknowledged that he and other investigators failed to appreciate that the killer may have been a stranger to Mrs. Eby – someone who either used a key, given to him or stolen from a potting shed on the Mott Estate's grounds, or prepared his way into the gatehouse days earlier with the expectation that he could escape and avoid the scrutiny of a "forced entry". (Apx. 72a). Mrs. Eby would never have opened her door to a stranger, they theorized. And, since it was clear that her unlocking her door was the only means of ingress, there was no reason to look elsewhere.

4. <u>The Cold Case Investigation: DNA Evidence Reveals The Killer's Identity</u>

What no one involved in the investigation knew at the time of Mrs. Eby's death was that Jeffrey Gorton was allowed access to the common area beneath Mrs. Eby's home by MFO agents or employees who failed to supervise Jeffrey Gorton and left Mrs. Eby defenseless to Jeffrey Gorton's attack. (Apx. 35a). With the aid of new technologies in fingerprint and DNA analysis, Flint authorities discovered that Jeffrey Gorton was a likely suspect. (Apx. 36a). Flint police followed Jeffrey Gorton for days and recovered a drinking cup which he tossed away at a roller rink. (*Id).* Flint police were able to match DNA from the saliva on the cup with that collected at the crime scene, and, on February 9, 2002, nearly sixteen years after the murder, Margarette Eby's killer was

arrested and charged. (*Id).*

Before Jeffrey Gorton's arrest, plaintiff had no factual basis on which to assert a claim of negligence and no facts on which to base a claim that these acts and omissions were a proximate cause of Mrs. Eby's death. After Gorton was identified sixteen years later, plaintiff became aware of the objective facts to support a claim that these defendants had breached certain duties of care which were a proximate cause of Mrs. Eby's death. Namely – that Jeffrey Gorton was allowed unsupervised access to the common area beneath Mrs. Eby's home by the Mott entities two days before he killed her. (Apx. 35a).

Before knowing that it was Jeffrey Gorton who killed Mrs. Eby, plaintiff could not allege the breach of the duty on the part of Mr. and Mrs. Gorton to conduct an adequate pre-employment investigation or to conduct the investigation in such a manner as to determine the potential threat to customers. (Apx. 37a). Without knowing that Jeffrey Gorton killed Mrs. Eby, plaintiff could not allege that Mr. and Mrs. Gorton had a duty to properly supervise him (Apx. 38a), or a duty to prevent him from entering homes where they knew or should have known that he posed a threat of harm to others. (Apx. 39a). Similarly, plaintiff had no facts on which to assert that Mr. and Mrs. Gorton owed a duty to Mrs. Eby under the doctrine of respondeat superior. (Apx. 40a). Obviously, without knowing that Jeffrey Gorton killed Mrs. Eby, plaintiff could not allege Jeffrey Gorton breached a duty to Mrs. Eby to not assault or harm her or others. *Id.* Any knowledge, reasonable or otherwise, that duties owed to Mrs. Eby were breached, arose only after her killer was identified.

5. <u>Defendants Admit Plaintiff Had No Reason To Know About Jeffrey Gorton</u>

This Court must note that the defendants in this case have failed to assert that plaintiff ever knew or had reason to know the identity of the killer any time prior to the arrest of Jeffrey Gorton.

Moreover, no defendant disputes that plaintiff neither knew nor had reason to know of Jeffrey Gorton's relationship to this case or the other parties. Thus, it logically follows that each defendant concedes that plaintiff had no way of knowing the facts which would implicate a duty owed to Mrs. Eby by any of them, the breach of those duties by any of them, or the proximate cause of Margarette Eby's damages without first knowing who killed Mrs. Eby or the killer's relationship to the other defendants.

Yet, MFO erroneously claimed that plaintiff had sufficient information to bring an undefined, generalized claim against MFO for breach of duty regarding the so-called failed security. (Apx. 4b). But, as the evidence demonstrates, there was simply no basis upon which to make that claim, because eyewitness accounts consistently indicated that the house's security was not breached. Rather, the overwhelming presumption was that Mrs. Eby opened the door voluntarily, to someone she likely knew, which would defeat any claim for breach of security.

6. Procedural History

This case is before the Court on interlocutory leave. (Apx. 13a). As a consequence of having its claim halted through the appellate process, the parties agreed to engage in some limited discovery pending receipt of the trial court's opinion on defendants' summary disposition motions. The trial court record shows interrogatories and document requests were made during the period prior to oral argument on the summary disposition motion. (Apx. 4a-7a). Seven months after the case was filed and after several motions to compel compliance with discovery requests, the parties were before the trial court for oral argument. (Apx. 7a). Following that hearing, the court promised a swift opinion and order. (Apx. 117a). That opinion was delivered to counsel on October 28, 2003. Counsel inquired if the court required additional briefing on the matter and the court ruled that it did not. *Id.*

7. **Discovery Regarding MFO**

Plaintiff sought any documents addressed in any way to MFO's supervision of Applewood, its employees and Mrs. Mott; for any documents speaking to the relationship between Mrs. Mott and Mrs. Eby. MFO's discovery responses were remarkable for a number of reasons. First, MFO produced numerous letters and memoranda clearly establishing the active management of the estate by it, not by Mrs. Mott. Second, and perhaps more importantly, MFO was asked for documents exchanged between Mrs. Eby and Mrs. Mott or anyone acting on behalf of Mrs. Mott. What MFO did not produce, and by implication attempted to conceal, was a series of letters between Mrs. Eby and MFO requesting assistance in the security of the gatehouse. Instead, MFO produced nothing, despite MFO's former Chief Executive Officer Paul Yager's actual knowledge of the series of letters he authored on behalf of MFO suggesting to Mrs. Eby that keeping her drapes closed would, perhaps, avoid "further unpleasantness." Plaintiff asked for these documents precisely for the reason that plaintiff believed they would lie about their existence and that is precisely what MFO did. When asked why these letters would not have been preserved in its files, Mr. Yager could not say.

If MFO was simply a passive player, with no stake in the game, why lie about documents? Why attempt to deceive the plaintiff and the court about the active management of the Mott estate and the relationship with Mrs. Eby?

Perhaps the answer lies in the flawed, unfaithful record MFO presents to this Court about the murder scene and the days that followed. Among the numerous palpable errors in the factual background is the suggestion that somehow, as if by prestidigitation, plaintiff should have known that MFO's lack of security was the basis for a cause of action against MFO. This argument is disingenuous, even comical, in light of the objective facts known to the plaintiff in 1986 or 1989 or

1992. Additionally, MFO takes a gratuitous shot at plaintiff claiming that plaintiff failed to perform discovery during the time the case sat in the trial court. While formal discovery was kept to a minimum, nevertheless all of the parties had the 2002 Michigan State Police Cold Crime Unit's file. The combination of the State Police file, the documents MFO *did* produce and the documents MFO sought to conceal reveal a compelling, unmistakable picture of MFO's liability for the murder of Mrs. Eby. Far from the red herring claims of MFO's appellate counsel, the truth is demonstrated in the documents and the testimony of Paul Yager. Throughout the period that Mrs. Eby lived in the gatehouse of the Mott estate, MFO was substantially in charge of the estate and managed the day to day affairs of the real property including the security issues relating to the gatehouse. MFO did more than speak for Mrs. Mott, it acted for her.

8. Discovery Regarding Buckler

While formal discovery was kept to a minimum pending receipt of the circuit court's opinion, nevertheless all of the parties sought and obtained the 2002 State Police file relating to Mrs. Eby's murder. That file is a virtual primer for the parties to understand the nature of the claim against MFO and the Gortons. Among the many discoveries in that file are the following:

a. Jeffrey Gorton had a history of violence against women. His felony convictions in Florida involved physical assaults upon women and taking undergarments off their bodies while striking the victims by surprise.

b. Jeffrey Gorton's paternal grandparents appeared for his sentencing in Florida and pleaded with the sentencing judge to permit Jeffrey Gorton to get psychiatric help for his violent, perverse outbursts against women.

c. Immediately upon his release from his 3 ½ year Florida prison term, Jeffrey Gorton returned to Michigan and began working for his parents' company, Buckler Automatic Sprinklers. Family and co-workers were immediately struck by Jeffrey Gorton's obsessive, perverse behavior around women.

d. Despite actual knowledge of their son's history for violence against women, which violent behavior was nearly always directed to complete strangers, nevertheless, Defendants Shirley and Laurence Gorton directed that Jeffrey Gorton act as the "inside" man during sprinkler maintenance. As the "inside" man, Jeffrey Gorton was sent into customer's homes for the purpose of opening and closing valves to the sprinkler system. A recipe for disaster could hardly be more perfectly scripted.

e. Jeffrey Gorton's fetish for stealing and collecting women's undergarments continued unabated after his release from prison. Several family members knew that Jeffrey Gorton continued to break into homes, steal garments and keep them at his home. His nickname was "Uncle Perv" to many in the Gorton family.

ARGUMENT

I. APPLICATION OF COMMON-LAW EQUITABLE PRINCIPLES IS NOT INCONSISTENT WITH THE STATUTES OF LIMITATIONS THAT APPLY TO THIS CASE.

Plaintiff has filed a brief in response to the arguments raised by the other three defendants in this case, Buckler Automatic Lawn Sprinkler Company, Shirley Gorton and Lawrence Gorton. That brief explains at some length why equity should be applied to this case that is governed by MCL 600.5805(10). *See* Plaintiff's Brief in Case No. 128579, pp. 3. Rather than repeating all of these arguments, plaintiff adopts them by reference in this brief.

II. EVEN IF MCL 600.5827 APPLIES TO THIS CASE, IT IS POSSIBLE TO READ A DISCOVERY RULE INTO THE TEXT OF THAT STATUTE.

The brief which plaintiff is filing in Case Number 128579 also contains a discussion of the discovery rule that is inherent in the text of MCL 600.5827. *See* Plaintiff's Brief, pp. 22. Plaintiff would incorporate those arguments herein.

III. EVEN IF THIS COURT FINDS THE DISCOVERY RULE TO BE INCONSISTENT WITH MCL 600.5827, THE LIMITATIONS PERIOD THAT APPLIES TO THIS CASE MUST BE BASED ON THE LAW THAT EXISTED AT THE TIME THIS CLAIM ACCRUED.

The brief which plaintiff is filing in Case Number 128579 also contains a discussion of the impact of MCL 600.5869 on the issues being raised in this appeal. *See* Plaintiff's Brief, pp. 31. Plaintiff incorporates those arguments in this brief.

IV. THE DISCOVERY RULE SHOULD BE APPLIED TO THIS CAUSE OF ACTION.

In Issue II of its brief, MFO argues the issue on which it sought leave to appeal. MFO contends that the discovery rule should not be applied to this particular cause of action. Specifically,

the defendant suggests that the discovery rule should not be applied to this case because this case involves the criminal acts of a third party. MFO contends that cases of this type "clearly push the edge of the litigation envelope and are stuffed with difficult public policy considerations about whether we are, indeed, our brother's keeper." MFO Brief, p. 29. While certainly colorful, this statement offers absolutely no insight into why the discovery rule should not be applied in this case.

MFO filed a motion for summary disposition immediately after this case was filed. That motion raised only the question of the statute of limitations. MFO did *not* raise in its motion any issue concerning duty, foreseeability or proximate cause, issues which may (or may not) have addressed the "difficult public policy considerations", raised in a tort case involving third party criminal conduct. Perhaps MFO would like to have raised these issues and it would like to have these issues before this Court, but the fact remains that it did not, and the "public policy considerations" alluded to in MFO's brief have no role whatsoever to play in a determination of whether the discovery rule should apply herein.[1]

In raising its "public policy" based argument, MFO is also operating under a fundamental misapprehension of present Michigan law. MFO contends that the purpose of this suit is to "shift" liability from Jeffrey Gorton's criminal act to the defendants. This is an absolutely erroneous view

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[1]Yet, even as MFO suggests that this type of case "push[es] the edge of the litigation envelope," MFO concedes as it must that negligence liability may arise even where there is intervening third party criminal conduct. *See e.g. Davis* v *Thorton*, 384 Mich 138; 180 NW2d 11 (1970); *Samson* v *Saginaw Professional Building, Inc*, 393 Mich 393; 224 NW2d 843 (1975) (landlord negligent in failing to take steps to protect tenants from an assault); *Johnston* v *Harris*, 387 Mich 569; 198 NW2d 409 (1972) (same); *May* v *Goulding*, 365 Mich 143; 111 NW2d 862 (1961). These Michigan cases reflect the generally accepted rule of law that criminal acts can, in the appropriate circumstances, be deemed reasonably foreseeable, giving rise to liability in negligence. *See* Restatement, Torts, 2d §302B, Restatement, Torts, 2d, §449, Prosser & Keeton, *Torts*, §44; 1 Dobbs, *The Law of Torts*, §190.

of Michigan law. Michigan law on this subject is reflected in MCL 600.6304, which specifies that the fault of *every* potential tortfeasor is to be presented to a jury in a personal injury action. This means that when this case is presented to a jury, the jury will have to assess Gorton's fault and his contribution to Mrs. Eby's death. But, the system of distributive fault established by the Michigan Legislature in §6304 means that the negligence of every other tortfeasor who contributed to Mrs. Eby's death, *including MFO*, will also have to be presented to the jury. And, most importantly, MFO will only be held responsible for that percentage of fault assessed against it, not any of the fault attributed to Gorton or any of the other defendants.

This is, therefore, not a case in which the responsibility for Ms. Eby's death will be "shifted" away from Gorton in to the laps of the other defendants. This is, instead, a case (like every other personal injury case) in which a jury will be asked to identify every possible tortfeasor who contributed to Mrs. Eby's death and to assess fault proportionally to each.

V. THE COURT OF APPEALS CORRECTLY DETERMINED THAT, UNDER THE DISCOVERY RULE, PLAINTIFF'S CAUSE OF ACTION ACCRUED ONLY WHEN THE CRIME WAS SOLVED AND THE DEFENDANT'S NEGLIGENCE COULD BE IDENTIFIED.

In Argument III of its brief, MFO states that "even if a discovery rule exists and even [if] it applies to 'third party' criminal act cases, the Estate's complaint was not timely. All elements of the claim existed and could have been properly pled long before three years pre-suit." MFO Brief at 31. This argument fails for three reasons. First, in presenting this argument MFO makes factual assertions that are contrary to the trial-court record, mischaracterizing plaintiff's complaint. MFO, instead, creates its own version of the facts. Second, when the facts are viewed as they were presented to the trial court, the discovery rule applies to this case because plaintiff had no knowledge

of the objective facts giving rise to a claim against MFO or Buckler. Third, even if this Court considers defendants' factual assertions, they are different from plaintiff's version of the facts. Such a factual dispute belongs before a jury, not before this Court.

A. MFO Improperly Recasts The Facts That Were Before The Trial Court

Apparently dissatisfied with its factual position before the trial court, MFO now takes the disingenuous approach of creating its own version of plaintiff's complaint, then responding to it. At the outset, plaintiff notes that MFO has improperly boiled down the various counts in plaintiff's complaint to a simple claim of failing to keep Mrs. Eby "safe". MFO Brief, pp. 2, 6, 33, 35, 37). Contrary to MFO's assertion, the complaint does far more than make a generalized statement about MFO's failure to keep Mrs. Eby "safe". Count 6 of the Complaint alleges breach of duty to prevent unsupervised access to the common areas beneath the gatehouse. Count 7 alleges that MFO is liable under respondeat superior for the negligence of Bakos and Nyberg in failing to secure the access to the common area thereby permitting Jeffrey Gorton to reenter the premises and murder Mrs. Eby. Count 8 alleges the breach of duty to provide adequate security thereby permitting Jeffrey Gorton access to Eby's home through the common area located beneath her home.

Nowhere does Plaintiff make the claim that MFO had a generalized duty to keep Mrs. Eby "safe". That MFO would make this argument is understandable, however, given MFO's need to recast this record. In the trial court, MFO argued that it was entitled to summary disposition because "[plaintiff] knew or reasonably should have known, based upon objective facts, that the attacker gained entry in unsupervised fashion through the common area beneath Eby's home, as now alleged." MFO Brief In Support, p. 4. The trial court denied MFO's motion for summary disposition on Count 6 and 7. The court reasoned that plaintiff "could not know that this duty had

been breached until the identity of the killer had been ascertained and the incidents leading up to the killing were divulged." (Apx. 125a). The circuit court distinguished Count 8 from 6 and 7 and granted summary disposition because, in its view, plaintiffs should have recognized in 1986 that the security provided by ...MFO was inadequate. (*Id*). On this point the circuit court found:

> Plaintiff's should have known that this cause of action existed at the time of Margarette Eby's murder in 1986. Although the identity of the killer was not known, Plaintiff should have recognized in 1986 that the security provided by the Estate of Ruth R. Mott and MFO was inadequate, thereby allowing *someone* access to the premises..."

(Apx. 125a).

Not satisfied that its trial theory was sufficient, MFO now suggests new and different reasons why plaintiff's claim should be deemed to have accrued in 1986.

> "That there was apparently no sign of forced entry does not establish that an *alarm* [first mentioned by MFO anywhere in pleading] system *would not have* thwarted the murderer. Gorton *might* have set off such an alarm, if it had been in place. He *might* have not thought Eby a suitable target if the gatehouse was visibly alarmed. Eby herself *might* have been able to set off the alarm to summon help."

MFO Brief, p. 36.

Presumably, MFO characterizes the complaint as a claim for failing to keep Mrs. Eby "safe" to bootstrap its argument that this same generalized complaint was available to plaintiff in 1986. But a generalized claim for failure to keep Mrs. Eby safe was not supported by the facts existing in 1986 and it is not what plaintiff alleged in her Complaint. Moreover, the generalized claim of negligence would have been legally deficient for any number of reasons. If the killer was Mrs. Eby's boyfriend (Flint Police's favorite theory) *might* she, just as likely, *have turned off* the alarm before welcoming him into her home? Plaintiff can only imagine the cries of "rank speculation" coming from the MFO camp had that claim been brought in 1986.

B. Plaintiff's Claim Was Timely Under The Current Case Law

With the facts properly framed, as they were before the trial court, it is clear that the discovery rule tolls the limitation period in this case until the plaintiff can allege, on the basis of objective evidence, all the elements of the claim. *Moll* v *Abbott Laboratories,* 444 Mich 1, 28; 506 NW2d 816 (1993) ("we find that a plaintiff's cause of action accrues when, on the basis of objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date"). Here, the objective evidence as of 1986 suggested a tragic lack of judgment on Mrs. Eby's part leading to her death at the hands of someone she knew. In 2002, the objective evidence demonstrated something quite different. As the Court of Appeals determined:

> With respect to plaintiff's negligence cause of action against Mott and MFO, negligence is composed of (a) a duty, (2) breach of the duty, (3) causation, and (4) damages. Although, at the time of the murder, plaintiff was aware of a duty owed to Eby by either Mott or MFO and of damages, plaintiff was unaware of any causal connection. The police theorized that a personal relationship existed between Eby and her killer because there was no sign of forced entry. This was an objective theory grounded in objective facts; thus, plaintiff's inability to recognize a possible cause of action was not merely a result of plaintiff's subjective beliefs. Until Jeffrey Gorton was implicated in the murder, there was no indication that Eby's killer was a stranger and, even with the exercise of reasonable diligence on the part of the police department, there was no causal connection between Eby's murder and any breach of duty by Mott or MFO. Therefore, the court should have determined that the discovery rule applied instead of improperly granting summary disposition to Mott and MFO.
>
> (Apx. 133a-134a) (internal citations omitted).

MFO's reliance on an unpublished per curiam opinion of the Court of Appeals decision in *Smith* v *Randolph,* Court of Appeals No. 251066, is of no help to MFO's argument. The Court in *Smith* determined that the action against the individual murderer was not tolled by the discovery rule but it *was* tolled by the fraudulent concealment statute, MCL 600.5855. No third parties were involved in *Smith* as they are in the present case and therefore the *Smith* court did not

speak to the issue of when the accrual of a claim occurs as to third parties.

In the present case, only Jeffrey Gorton could claim that the limitations period was not tolled by the discovery rule. The manner in which the claim accrues as to Gorton, however, is entirely different than the accrual of claims against the other defendants as the Court of Appeals properly noted in this case. The standard for determining when the claim accrues as to the other defendants is set forth in *Moll*. Applying *Moll* to the present case, this inquiry is straightforward: On the basis of *objective evidence*, how would one know that Jeffrey Gorton was the murderer prior to 2002? How could one know that MFO failed to supervise the common area under the gatehouse while Gorton was within the confines of Mrs. Eby's rented home? How does one make the connection to MFO's failure to safeguard its common area, even charged with the knowledge that break-ins have occurred in the past, when the appearance of the crime scene suggests Mrs. Eby greeted her murderer at the front door and allowed his entrance into her home? How does one realize that the tragic, though predictable, sequence of events beginning with Gorton's release from prison for brutal assaults on women would end with the assault, torture and murder of Mrs. Eby? How do you determine that Laurence and Shirley Gorton permitted, indeed directed, Jeffrey Gorton unsupervised access into people's homes? You cannot; not until you identify Jeffrey Gorton, this missing piece of the puzzle, that brings the other players into focus.

MFO posits the interesting question: How "much" does it take to create a possible cause of action? Yet, MFO fails to answer its own question. Neither *Heisler* v *Roberts*, 113 Mich App 630; 318 NW2d 503 (1982), which rejected the discovery rule's application under a "continuing wrong" theory nor *Thomas* v *Ferndale Laboratories*, 97 Mich App 630; 318 NW2d 160 (1980), support MFO's defense. In *Thomas*, plaintiff's daughter had actual knowledge that her illness was

caused by the drug diethylstilbestrol (DES), but claimed that she did not know the *name* of the manufacturer. Unlike the present case where plaintiff had no knowledge that there existed any complicit parties other than the murderer, the court in *Thomas* rejected application of the discovery rule where the plaintiff had actual knowledge of the elements and simply lacked the specific name of a specific offender.

This is not the first time MFO has obscured the case law to fit its theory. The Court of Appeals in this case already heard these distorted claims and ruled:

> We reject defendants' argument that the discovery rule is inapplicable because this is simply a case of unknown identity, and the courts have consistently held that the rule is inapplicable in such cases. This is not a case where plaintiff knew of an injury and its cause, but did not know the identity of the actor. Plaintiff knew that Eby was murdered, but did not know that anyone had caused Eby harm other than the killer. Plaintiff could not have known of a cause of action against anyone in Buckler's, the Gortons', Nyberg's, or Bako's positions until the facts of the murder were uncovered.
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> *Trentadue* v *Buckler Automatic Lawn Sprinkler Company*, 266 Mich App 297, 303 (2005).

C. The Discovery Rule Issues In This Case Are Questions For The Jury

No reasonable person would conclude that plaintiff knew or should have known about the existence of the claims brought against these defendants. Plaintiff did not know a cause of action existed against anyone until Jeffrey Gorton was arrested and the various relationships between Gorton and the other defendants were revealed. Nevertheless, these defendants claim that the plaintiff knew, or should have known, about this cause of action in 1986. At the very most, this dispute is a question of fact and cannot be determined by this Court as a matter of law. "If a question of fact exists as to when the plaintiff discovered or should have discovered a cause of action, then summary disposition is improper." *Mascarenas* v *Union Carbide Corp*, 196 Mich App

240, 245; 492 NW2d 512, *Moll, supra* at 735.

D. MFO's Claim That Wrongful Death Actions Are Running Rampant Is Nonsense

MFO offers a final position statement in its third argument, that "[m]urders are spinning off wrongful death actions all over the country....." MFO must be reading different journal articles than those available to the rest of us, because plaintiff has no reference point for MFO's Chicken Little prediction that the 'sky is falling'.

The cases cited by MFO are almost entirely brought by plaintiff's decedent against the murderer. Like *Smith v Randolph, supra,* these claims were evident at the time of the murder. Whether or not a discovery rule could have saved these actions against the murderers involved is irrelevant in light of Michigan's fraudulent concealment statute. Michigan has adopted a different savings provision (as many other states have, *infra*) and therefore the absence of a discovery rule savings provisions lends nothing to the discussion before this court.

Moreover, plaintiff disagrees that "confusion reigns" on this issue as the overwhelming majority of states have a discovery rule arising out of equitable principles. Thirty-five states plus the District of Columbia have embraced the discovery rule according to equitable principles.[2] (NewYork, for example, determines the limitation accrual period at the time the

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[2]Alaska; *Hanebuth* v *Bell Helicopter Int'l*, 694 P2d 143, 146-147 (Alaska 1984) Arkansas; *State* v *Diamond Lakes Oil Co*, 347 Ark 618; 66 SW3d 613 (2002) California; *Norgart* v *Upjohn*, 21 Cal 4th 383, 399 (1999), Colorado; *Rauschenberger* v *Radetsky*, 745 P2d 640, 643 (CO 1987) Connecticut; *Champagne* v *Raybestos-Manhattan, Inc*, 212 Conn 509, 521; 562 A2d 1100 (1989) Delaware; *In re Asbestos Litigation West Trial Group*, 622 A2d 1090, 1092 (Del Super Ct 1992) Florida; *Johnson* v *Szymanski,* 368 So2d 370 (Fl 1979) Georgia; *King* v *Seitzingers, Inc,* 160 Ga App 318, 319-320 (1981) Hawaii; *Yoshizaki* v *Hilo Hosp*, 50 Haw 150, 154 (1967) Indiana; *Wehling* v *Citizens Nat'l Bank*, 586 NE2d 840, 843 (Ind 1992) Iowa; *Roycroft* v *Hammons*, 203 F Supp 2d 1053 (2002) Louisiana; *Harvey* v *Dixie Graphics, Inc*, 593 So2d 351 (1992) Maine; *Johnston* v *Dow & Coulombe*, 686 A2d 1064, 1066; 686 A2d 1064 (1996) (legal and medical malpractice and asbestos) Maryland; *Georgia-Pacific Corp* v *Benjamin*, 2006 Md LEXIS 478, Minnesota (for fraud); *Johnson*

plaintiff knew or in the exercise of reasonable diligence should have known of the claim).

MFO's suggestion that confusion reigns regarding the discovery rule in the United States is incorrect. Thirty-Five states and the District of Columbia are not confused and have determined that a savings provision identical to the one first articulated in *Johnson* v *Caldwell*, 371 Mich 368; 123 NW2d 785 (1963), *Williams* v *Polgar*, 391 Mich 6; 215 NW2d 149 (1974), *Moll, supra* or *Chase* v *Sabin*, 445 Mich 190, 516 NW2d 60 (1994), is necessary to foster the equitable principle that "we don't declare the bread stale before it is baked". What MFO's argument really underscores is that if this Court eliminates application of a discovery rule, it would put Michigan within a tiny majority of states that do so.

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v *Winthrop Laboratories Div of Sterling Drug, Inc*, 291 Minn 145, 151 (Minn 1971). Mississippi; *Sweeney* v *Preston*, 642 So2d 332, 334 (Miss 1994) Nebraska; *Condon* v *A.H. Robins Co*, 349 NW2d 622 (D Neb 1984) Nevada; *Siragusa* v *Brown*, 114 Nev 1384, 1392; 971 P2d 801 (1998) New Hampshire; *Big League Entm't, Inc* v *Brox Indus*, 149 NH 480, 485; 821 A2d 1054 (2003) New Jersey; *Mancuso* v *Mancuso*, 506 A2d 1253 (NJ 1986) New Mexico; *McNeill* v *Rice Eng'g & Operating Inc*, 2006 NMCA 15, 30; 128 P3d 476 (2005) North Dakota; *Wells* v *First Am Bank West*, 1999 ND 170, P10; 598 NW2d 834 (1999) Ohio; *Collins* v *Sotka*, 692 NE2d 581 (Ohio, 1998) Oklahoma; *Resolution Trust Corp* v *Grant*, 1995 OK 68, P15; 901 P2d 807 (1995) Pennsylvania; *Murphy* v *Diogenes A. Saavedra, MD*, PC, 560 Pa 423, 426; 746 A2d 92 (2000) Rhode Island: *Wilkinson* v *Harrington*, 104 RI 224; 243 A2d 745, 239 (RI 1968) (but not for wrongful death) South Carolina; *Gattis* v *Chavez*, 413 F Supp 33, 39 (DSC 1976) Tennessee; *Hathaway* v *Middle Tennessee Anesthesiology, PC*, 724 SW2d 355, 360 (Tenn Ct App 1986) Texas; *McDade* v *Texas Commerce Bank, Nat'l Ass'n*, 822 SW2d 713, 719 (Tex App1991) Utah; *Klinger* v *Kightly*, 791 P2d 868, 872 (Utah 1990) Vermont; *Leo* v *Hillman*, 164 Vt 94, 98-99 (Vt 1995); 14 VSA §1492 (but excluding wrongful death) Virginia; *Locke* v *Johns-Manville Corp*, 221 Va 951, 959 (Va 1981) Washington; *White* v *Johns-Manville Corp*, 103 Wn2d 344, 352-353 (Wash 1985) West Virginia; *Gaither* v *City Hosp*, 199 W Va 706, 712 (W Va 1997) Wisconsin; *Hansen* v *A.H. Robins, Inc*, 113 Wis 2d 550, 556 (Wis 1983) Wyoming; *Olson* v *A.H. Robins Co*, 696 P2d 1294, 1297 (Wyo 1985) District of Columbia; *Burke* v *Washington Hospital Center*, 293 F Supp 1328, 1334 (DDC 1968).

VI. THE COURT OF APPEALS CORRECTLY DETERMINED THAT SUMMARY DISPOSITION WAS NOT APPROPRIATE ON PLAINTIFF'S VICARIOUS LIABILITY CLAIM AGAINST MFO BASED ON THE NEGLIGENCE OF DEFENDANTS NYBERG AND BAKOS.

In the final issue in its brief, MFO claims that Count 8 of plaintiff's Complaint, which alleges respondeat superior liability based on the negligence of Todd Bakos and Victor Nyberg, should have been dismissed pursuant to MCR 2.116(C)(10). MFO's motion in the trial court was supported by the affidavits of Bakos and Nyberg, who stated that they were employed by Mrs. Mott and not by MFO. MFO argues therefore that there is no way that MFO could be found to have exercised control over these persons or that they could be found to be liable for their actions. MFO claims the trial court and Court of Appeals erred by failing to dismiss this aspect of plaintiff's Complaint because the affidavit filed by plaintiff's trial counsel pursuant to MCR 2.116(H) and the other documentary evidence submitted by plaintiff was somehow deficient. Without identifying how the affidavit was deficient, and completely ignoring plaintiff's offer of documentary evidence, MFO returns to its pattern of distorting the trial court record for its own purposes.

The record in the trial court reveals that motions for summary disposition were filed by all defendants under MCR 2.116(C)(7) and in the case of MFO based on MCR 2.116 (C)(10), *in lieu of each defendants' Answer to the Complaint* and *before any discovery had begun.* Plaintiff was required to respond to four separate summary disposition motions (the current two Defendants as well as motions filed by the Estate of Ruth Mott and Bakos/Nyberg).

As to MFO's motion under MCR 2.116(C)(10), plaintiff responded in two ways. First, plaintiff pointed to the letter from MFO's CEO, Paul Yager, in support of plaintiff's claim that MFO was actually in charge of Mrs. Eby's occupancy of the gatehouse. (Apx. 56a). Further, plaintiff

alleged that MFO was legally responsible for the conduct of the individual defendants Bakos and Nyberg and offered to prove that at trial. In support of that position, plaintiff's trial counsel filed an affidavit under MCR 2.116(H)(10), alleging that the deposition of "the MFO representative in charge of the personal affairs of Mrs. Mott" would establish the conclusion that "MFO is legally responsible for the actions of Todd Bakos and Victor Nyberg as described in plaintiff's Complaint at Counts VI, VII and VIII. (Apx. 70a).

MCR 2.116(H) provides that where affidavits are unavailable, a party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. In this case, the affidavit of the person unavailable to plaintiff was the executive at MFO in charge of Mrs. Mott's day to day affairs and that is precisely how the affidavit was drafted.[3]

MFO further distorts the trial record by claiming plaintiff had one full year to conduct discovery, however at the summary disposition hearing in March, 2003, plaintiff's counsel sought the order of the court as to whether the parties were required to supplement the record and the court said they were not. (Apx. 117a) Therefore the record, for purposes of the summary disposition was closed. The trial court's ruling was to be based upon the record before it as of March, 2003. Yet MFO would claim that "[a]t some point prior to the trial court's ruling, the Estate was required to produce concrete admissible evidence that MFO controlled Nyberg and Bakos." That is not the standard applicable to a response to a motion for summary disposition. When faced a motion under

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[3]Since the denial of the motion, Paul Yager, former CEO has testified that he was substantially in charge of virtually any and all aspects of Applewood. Yager testified that he made decisions and recommendations regarding employee matters, including hiring/firing and even the nature and extent of job duties and responsibilities of various grounds keepers.

MCR. 2.116(C)(10), the responding party is required to produce substantially admissible evidence, by way of affidavits, depositions, admissions, or other documentary evidence in order to avoid summary disposition. *Quinto* v *Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

Since the denial of the motion in the trial court, plaintiff has produced more than adequate evidence of the control MFO exerted over the management of the Mott Estate. Once this case is remanded to the circuit court, plaintiff need only present the testimony of MFO's CEO Paul Yager to support the proposition that MFO was in charge of the day-to-day operations at Applewood, including the management of personnel, security and lease arrangements for the gatehouse.

Finally, upon remand, should this evidence be deemed insufficient, the defendant has recourse before the trial court. Defendant's bald conclusions that they were not employed does not close the issue as these affidavits fail to address whether either Bakos or Nyberg took direction from persons employed by MFO or the nature and extent of MFO's participation in the day to day operations at the Mott estate. MCR 2.116(H) is specifically designed to allow plaintiff to test whether the legal conclusions of these two lay people made at the very outset of the case, before any discovery had been conducted would hold up to scrutiny before being required to answer the motion. Indeed the likelihood is they will not.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee, The Estate of Margarette F. Eby, Deceased, by its Personal Representative, Dayle Trentadue, respectfully requests that this Court affirm the Court of Appeals' March 24, 2005, decision and remand this matter to the Genesee County Circuit Court for further proceedings.

Respectfully submitted,

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Dated: November 15, 2006

CERTIFICATE OF SERVICE

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I declare under penalty of perjury, that the above-statements are true to the best of my knowledge, information and belief.

Linda S. Allen

LINDA S. ALLEN